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No. 5, Original

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE STATE OF NEBRASKA, COMPLAINANT

v.

THE STATE OF WYOMING, DEFENDANT

v. and

THE STATE OF COLORADO, IMPLEADED, DEFENDANT

THE UNITED STATES OF AMERICA, INTERVENOR

ANSWER OF COMPLAINANT, STATE OF NEBRASKA, TO THE PETITION OF INTERVENTION OF THE UNITED STATES OF AMERICA

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PAUL F. GOOS,
Special Counsel,
Solicitors for Complainant,
State of Nebraska.

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 8, Original

THE STATE OF NEBRASKA, COMPLAINANT

v.

THE STATE OF WYOMING, DEFENDANT

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT

THE UNITED STATES OF AMERICA, INTERVENOR

ANSWER OF COMPLAINANT, STATE OF NEBRASKA, TO THE PETITION OF INTERVENTION OF THE UNITED STATES OF AMERICA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the State of Nebraska, by Richard C. Hunter, its Attorney General, and respectfully pre-

sents unto this court its answer to the petition in intervention of the United States of America, as follows:

I

For answer to the first cause of action of the United States, this complainant alleges and shows as follows:

1. This complainant admits the allegations of the first and second paragraphs of said cause of action.

2. This complainant admits the allegations of the third paragraph of said cause of action, except that this complainant avers that under the policy of the United States at the time of the said cessions, as declared and pronounced by the legislation then in force, the United States held the lands and rights in water within the ceded territories as trustee for the states which should ultimately be created and established within said territories, and ultimately for the benefit of those individual settlers who should, under the laws and regulations of the Congress of the United States, become the private and individual owners of the lands so ceded.

3. This complainant denies the allegations of the fourth paragraph of said cause of action and on that behalf avers that upon the creation and admission to the Union of the States of Nebraska, Wyoming, and Colorado, the rights so previously held in trust by the United States, to the waters of the North Platte River, passed to said states subject only to the correlative rights of each of the other two states in the

waters of said stream for the reason that said states, upon their admission into the Union, were established and placed in the same position as each and every one of the thirteen original states of the Union.

4. With reference to the fifth paragraph of said cause of action, this complainant avers, supplementing the preceding paragraphs hereof, that the legislation referred to in said fifth paragraph constituted a recognition of the rights of the states respectively over said waters, and a recognition of the rights of the individuals within said respective states to acquire water rights to the waters of said North Platte River. This complainant further admits that from time to time private persons have by appropriation in compliance with the laws of one or another of the litigant states, acquired rights to use certain quantities of the waters of the North Platte River, but this complainant denies that the rights so acquired were acquired from the United States, and avers that by the express terms of the Congressional legislation referred to, the rights so acquired were recognized as acquired from said states. This complainant further avers that the Reclamation Act (June 17, 1902, c 1093, 32 Stat. 388) expressly required the Secretary of the Interior, in initiating or operating on behalf of the United States, a project involving the use of the waters of the naturally flowing streams in said states, to comply with the laws of said states and to acquire by appropriation, in the same manner as any private appropriator, such rights as he might need or desire on behalf of the United States; and that in the Warren Act (Act of February 21, 1911, ch. 141, 36 and Stat.

925) and further in the Federal Water Power Act (Act of June 10, 1920, c. 285, § 27, 41 Stat. 1077) the Congress of the United States again recognized and re-affirmed on behalf of the United States the rights and powers of the States over the waters flowing in the natural streams of the respective states. This complainant denies that in the operation of such Reclamation projects the United States has reserved any waters of the river, and denies that any rights in such waters have ever "remained" in the United States, but avers that the only rights of the United States in and to such waters are such rights as have been acquired by the United States by appropriation under the laws of the respective states.

5. This complainant admits the allegations of the sixth paragraph of said cause of action, except that this complainant avers that the so-called "North Platte Project" is a convenient grouping by the officials of the United States Bureau of Reclamation of several separate and distinct projects, to-wit: The Pathfinder and Guernsey Reservoirs created for the purpose of storage of natural flow waters and their retention, the Pathfinder Irrigation District, the Gering-Ft. Laramie Irrigation District, the Northport Irrigation District, and the Goshen Irrigation District, which, constitute the irrigation projects originally constructed by the United States; and the Guernsey and Lingle power plants, which constitute hydro-electric developments for the purpose of utilizing the waters of the North Platte River. In connection with said sixth paragraph, this complainant further avers that the operation and maintenance of said irrigation

projects has been turned over to the water users as organized into irrigation districts under the laws of the respective states, as required by the Acts of Congress and U. S. Reclamation Act and Amendments thereto and that the United States retains only such control over them as may be necessary or desirable in order to protect its investment and protect the security for the repayment of the sums still unpaid and owing to the United States.

6. With reference to the seventh paragraph of said cause of action, this complainant admits the allegations thereof, except that this complainant denies that the United States "reserved" any of the waters of said stream, but, on the contrary, avers that the United States proceeded, as required by the Reclamation Act hereinbefore referred to, by way of appropriation in the respective states following the procedure required by the laws of said states. With reference to the appropriations so made, this complainant avers that under the laws of the States of Nebraska and Wyoming, and under the terms of the United States Reclamation Act, all water rights acquired are appurtenant to land, and each of such appropriations so made by the United States, when made, attached to and became appurtenant to specific lands located in said states, and the United States did not become the beneficial owner of such water rights except insofar as they attached to lands owned by the United States. This complainant further avers that all such appropriations for irrigation purposes upon lands not belonging to the United States of America were made as trustee for the owners of

the lands upon which beneficial use of said waters was to be made, and that the sole interest of the United States in such appropriations was as carrier of the waters for the benefit of said landowners. Insofar as said appropriations were for storage purposes, said appropriations were for the benefit of the landowners upon whose lands said waters were to be beneficially used, each such landowner being the owner of an aliquot part of the storage space in said reservoirs. Insofar as said appropriations were for the purpose of generation of hydro-electric power, the same were incidental and ancillary to the uses for irrigation, and for the purpose of reducing to the irrigators the cost of storage and carriage of waters, the net revenues from said hydro-electric power plants being used for the purpose of reducing to the irrigators the cost of such waters, and to reduce for such irrigators the obligation incurred by them to the United States for the storage and carriage of waters.

7. With reference to the eighth paragraph of said cause of action, this complainant admits the allegations thereof, except that, as hereinbefore alleged, this complainant avers that none of the waters of said North Platte River were ever "reserved" by the United States, but that all of the rights of the United States in and to said waters were and are rights acquired by appropriation. With further reference to said eighth paragraph, this complainant denies that the settlers to whom the public lands described therein were transferred, acquired any rights to waters from the United States, but avers that the rights of said settlers were and are acquired by virtue of appropriations made

under the laws of the respective states, and that the only rights acquired by such settlers in relation to the United States were and are the right to have the waters appropriated by them stored and carried in the reservoirs and canals originally constructed by the United States, or carried only, insofar as said waters were natural flow waters. With further reference to said eighth paragraph, this complainant denies that the United States ever had the power to agree to "furnish" any waters to any landowners, and denies that the United States is now "furnishing" any waters to any settlers or landowners, and on that behalf avers that the United States merely agreed to store and carry, or carry only, the waters to which the appropriations of said settlers and landowners entitled them, and that the United States is now storing and carrying waters in accordance with said contractual relations. On that behalf, however, complainant avers that the United States, under the authority of appropriate Acts of Congress, has transferred to the above mentioned irrigation districts respectively, the operation, maintenance, possession, and control of all canals, laterals, storage reservoirs, and other works used and useful in connection with their respective projects, reserving possession, operation, maintenance, and control only of the Pathfinder and Guernsey Reservoirs, the Guernsey and Lingle hydro-electric power plants, and the Whalen diversion dam at Whalen, Wyoming, used for the purpose of diverting

water flowing in the North Platte River into the Interstate and Gering-Fort Laramie canals.

8. With reference to the ninth paragraph of said cause of action, this complainant admits the allegations thereof, except that this complainant denies that the appropriations made by the United States constituted a "reservation" of any of the waters by the United States, and with reference to the said hydro-electric plants, this complainant avers that during the irrigation season, the waters used in said hydro-electric plants are largely waters which are required for Nebraska's senior appropriators and which can be used by said hydro-electric plants only because said plants are physically upstream from said senior appropriators and because the uses made in said hydro-electric plants are non-consumptive and do not in practical effect interfere with the irrigation rights of said senior Nebraska appropriators.

9. With reference to the tenth paragraph of said cause of action, this complainant admits the allegations of fact therein contained, except that this complainant denies the allegation with reference to "reservation" of waters of the North Platte River by the United States; denies the allegation with reference to "furnishing" waters to any irrigators or appropriators; denies that the United States is "supplying" waters to any appropriators, and denies the characterization of the waters which are used by the Warren Act Contractors as being only storage, seepage, and return flow; and denies the claim that any seepage or return flow waters used by any appropriators are

"project waters" and denies the claim that more than half of the waters used by Warren Act Contractors are project waters. With reference to said tenth paragraph of said cause of action, this complainant further avers that the Warren Act Contracts with Nebraska irrigation projects include one contract with a private canal company not organized as a district, namely the Beerline Canal Company, a mutual corporation, consisting of the landowners to whose lands the water rights to waters delivered through said Beerline Canal are appurtenant. This complainant avers that the waters used by said districts and company which have entered into Warren Act Contracts are originally natural flow waters naturally flowing in the North Platte River and its tributaries. Insofar as said districts and company use return flow waters, more than 1/3 of such return flow waters come from private projects in which the United States has no interest. Insofar as said districts and company have acquired any storage rights under said Warren Act (Act of Feb. 21, 1911, 36 Stat. 925) said rights are to storage space in the Pathfinder Reservoir. With reference to the nature of said contracts, this complainant avers that they do not constitute an agreement by the United States to furnish a stipulated quantity of water but only that the United States undertook to furnish storage space in said Pathfinder Reservoir so that such storage would supplement the natural flow rights of said districts and company respectively up to a certain stipulated quantity of water both in rate of diversion and in total quantity diverted during a particular season.

10. With reference to the eleventh paragraph of said cause of action, this complainant denies that any waters appropriated by the United States were "reserved" and as to any purported contract which the Secretary of the Interior claims to have entered into with municipal and industrial concerns, this complainant has no information or knowledge and, therefore, denies said allegations. With reference to said allegations, however, this complainant avers that neither the United States nor the Secretary of the Interior had or has had authority or power to sell any quantity of water, and denies that water can be, under the laws either of the State of Wyoming or the State of Nebraska, the subject of any barter or sale.

11. This complainant admits the allegations of the twelfth paragraph of said cause of action.

12. With reference to the thirteenth paragraph of said cause of action, this complainant denies that the United States "reserved" any waters and on that behalf avers that the United States proceeded like any other appropriator in the appropriation of waters for the benefit of said Kendrick Project.

13. With reference to the fourteenth paragraph of said cause of action, this complainant admits the allegations thereof, except with reference to the claim of "reservation" of waters of the North Platte River; and except that this complainant denies that any waters in connection with the "Kendrick Project" will augment the flow of the North Platte River for the

reason that no waters from any other source than the North Platte River and its tributaries will be used, and the complainant avers that all the waters which are in any manner to come into said project are the waters which are and will be naturally flowing within the watershed of the said North Platte River; and this complainant further avers that the large amount of evaporation and that the large amount of consumptive uses of the waters of the North Platte River which will be made in irrigation on the Kendrick Project, will create a great depletion of the waters of said River.

II

With reference to the second cause of action of the United States, this complainant respectfully alleges and shows as follows:

1. With reference to the first paragraph of said cause of action, repeating and re-alleging the allegations contained in paragraph six of the first cause of action, this complainant repeats and re-alleges the admissions, denials, and allegations hereinbefore set up in its specific answer to said sixth paragraph of said first cause of action.

2. This complainant admits the allegations of the second paragraph of said cause of action.

3. With reference to the third, fourth, fifth, sixth, seventh, eighth, and ninth paragraphs of said cause of action, this complainant repeats and re-alleges the admissions, denials, and allegations hereinbefore con-

tained in the seventh, eighth, ninth, tenth, eleventh, twelfth, and thirteenth paragraphs of its answer to intervenor's first cause of action, said paragraphs of said answer being respectively the paragraphs answering the corresponding paragraphs in intervenor's first cause of action.

III

This complainant further re-alleges and incorporates herein the allegations contained in its Bill of Complaint, particularly the allegations of the eighth, ninth, tenth, eleventh, twelfth, and thirteenth articles thereof.

IV

This complainant further avers that the lands in Nebraska irrigated under the various projects grouped together and called by intervenor the "North Platte Project" are lands which should be protected in Nebraska and by Nebraska as a part of Nebraska's rights to the waters of the North Platte River under the priority date as alleged in complainant's Bill of Complaint, and complainant asks this Court to protect said lands and the water rights appurtenant thereto against the unlawful encroachments of the defendants and intervenor as alleged in complainant's Bill of Complaint.

WHEREFORE, complainant prays as prayed in its original Bill of Complaint, and prays that this Court

may enter its order protecting the rights of the Nebraska lands in and to the waters of the North Platte River, including the lands irrigated from and under the canals originally constructed by the United States.

STATE OF NEBRASKA, *Complainant.*

By RICHARD C. HUNTER
Attorney General of Nebraska,
PAUL F. GOOD,
Special Counsel,
Solicitors for Complainant.

STATE OF NEBRASKA, }
COUNTY OF LANCASTER } ss.

Richard C. Hunter, being first duly sworn upon his oath according to law, deposes and says that he is the Attorney General of the State of Nebraska and as such is authorized by the act of the Legislature of the State of Nebraska to appear in this Court in this cause; that he has read the foregoing answer and the facts therein set forth, saving and excepting those averred on information and belief, are true; and that as to the facts therein alleged as upon information and belief affiant is credibly informed and verily believes that the said facts are true.

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Subscribed in my presence and sworn to before me this.....day of July, 1938.

.....

Notary Public

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